No. 87-997

DEC 17 1987
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE: C. H. BUTCHER, JR.

Debtor,

JAMES R. MARTIN, TRUSTEE,

Petitioner,

v.

FIRST NATIONAL BANK OF LOUISVILLE, KENTUCKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the decision of the Sixth Circuit Court of Appeals, affirming the District Court's holding that Bankruptcy Rule 9006(a) was inapplicable to compute the end of the two-year time period set forth in 11 U.S.C. §546(a), is in conflict with other federal court of appeals' decisions and inconsistent with this Court's decision in Union National Bank v. Lamb, 337 U.S. 38 (1949).

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FIRST NATIONAL BANK OF LOUISVILLE, KENTUCKY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James R. Martin, Trustee in Bankruptcy for the Estate of C. H. Butcher, Jr., plaintiff and petitioner, (hereinafter "Trustee"), prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, filed September 23, 1987, in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reported at 829 F.2d 596 (6th Cir. 1987), appears in Appendix C hereto.

The Order and Memorandum opinion of the United States District Court for the Eastern District of Tennessee, Civil Case No. 3-86-054, Slip opinion (E.D. Tenn. 1986) appears in Appendix B hereto.

The opinion of the United States Bankruptcy Court for the Eastern District of Tennessee, reported at 57 B.R. 101 (Bkrtcy. E.D. Tenn. 1985), appears in Appendix A hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was filed on September 23, 1987. This petition for a writ of certiorari is filed within (90) ninety days of that date. This court's jurisdiction is invoked under Title 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 11, U.S.C. Section 546(a)(1979):

§546. Limitations on Avoiding powers.

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the

earlier of--

(1) two years after the appointment of a trustee under section 702, 1104, 1163, or 1302 of this title; and

(2) the time the case is closed or dismissed.

Bankr. Proc. Rule 9006(a), 11 U.S.C.:

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 5001(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President

or the Congress of the United States, or by the state in which the court is held.

Fed. Rules of Civ. Proc. Rule 6(a), 28 U.S.C.:

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

STATEMENT OF THE CASE

This action was brought by James R. Martin (hereinafter "Trustee") who was appointed Trustee of the bankruptcy estate of C. H. Butcher, Jr. (hereinafter "Butcher") on August 17, 1983. The Trustee commenced an adversary proceeding against First National Bank of Louisville, Kentucky (hereinafter "First National") on August 19, 1985, seeking to avoid preferential transfers by the debtor to the defendant under 11 U.S.C. §547(b)(1979), and fraudulent transfers under 11 U.S.C. §544(b) and §548(a)(1979) in the aggregate amount of $1,986,204.22. On September 20, 1985, First National filed a Motion to Dismiss the Complaint, contending that the action was barred by 11 U.S.C. §546(a), the applicable statute of limitations.

On December 30, 1985 the bankruptcy court denied First National's Motion to Dismiss. The court determined that Bankruptcy Rule 9006(a) applied to the computation of the two-year statute of limitations contained in §546(a) because it would not enlarged the Trustee's substantive rights. Accordingly, the court did not include the day of the Trustee's appointment in the computation of the two-year period and also found that Bankruptcy Rule 9006(a) extended the limitations period to the end of the next business day (Monday, August 19, 1985), since the two year period expired on a Saturday. The bankruptcy court thus concluded that the action was timely filed. Martin v. First National Bank of Louisville, (In re Butcher), 57 B.R. 101 (Bkrtcy. E. D. Tenn. 1985)[Appendix A]. The District

Court granted First National's Motion for Leave to Immediately Appeal pursuant to 28 U.S.C. §1292(b).

On July 21, 1986 the District Court, by Order and Memorandum Opinion [Appendix B], reversed, relying on the Sixth Circuit Court of Appeals' decision in Rust v. Quality Car Corral, Inc., 614 F.2d 1118 (6th Cir. 1980). The Rust court held Federal Rule of Civil Procedure 6(a) inapplicable to the statute of limitations contained in the Truth in Lending Act, 15 U.S.C. §1640(e) (1974), amended by 15 U.S.C. §1640(e)(1982).

The district court reasoned that because the Trustee did not file the Complaint until after the expiration of the two year statute of limitation period contained in §546(a), the bankruptcy court never had jurisdiction and Bank-

ruptcy Rule 9006(a) could not be used to extend the statutory period to the following Monday.

On July 29, 1986 the Trustee filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On July 30, 1987, oral argument was held and on September 23, 1987 the court of appeals entered a judgment and opinion affirming the United States district court's decision and dismissing the Complaint. The court of appeals agreed with the district court that its decision in Rust required the conclusion that the Trustee's Complaint was not timely filed and that the bankruptcy court did not have jurisdiction to hear the action. Martin v. First National Bank of Louisville, (In re Butcher), 829 F.2d 596 (6th Cir. 1987)[Appendix C].

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STATEMENT OF FACTS

On June 24, 1983 an involuntary petition in bankruptcy seeking relief under Chapter 7, Title 11, United States Code (United States Bankruptcy Code) was filed against C. H. Butcher, Jr., (hereinafter "Butcher") in the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division. An Order for Relief was entered by the court on July 15, 1983 and James R. Martin, (hereinafter "Trustee") was appointed as Trustee of the bankruptcy estate on August 17, 1983.

From the inception of the case, Butcher had refused to answer questions concerning his assets and liabilities, and had withheld from the Trustee records relating to the bankruptcy estate and had

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likewise failed to turn over assets to the Trustee. Butcher has concealed, falsified and failed to keep or preserve recorded information from which his financial or business transactions might be ascertained. As a result of his actions and contravention of the bankruptcy laws, the debtor was denied a discharge on August 6, 1984. On April 8, 1987, the debtor pleaded guilty to bankruptcy fraud and conspiracy to commit bankruptcy fraud. He is currently serving a twenty-year sentence in a federal penitentiary.

Accordingly, the Trustee has not had the benefit of Butcher's books and records or of the Debtor's cooperation in conducting his investigation of the Debtor's business affairs. The Trustee has conducted numerous depositions and exa-

minations pursuant to Bankruptcy Rule 2004, of individuals related to or engaged in business with Butcher.

In the course of his investigation, the Trustee received information by letter dated February 14, 1984 from Mark J. Miller, Assistant to the Liquidating Trustee of Southern Industrial Banking Corporation ("SIBC"), a Tennessee industrial loan and thrift company owned and controlled by Butcher, regarding the sale of two banks in the Butcher banking system. Through numerous interviews the Trustee discovered that four of the Butcher banks in Kentucky were sold on the 24th and 25th of May, 1983, and that the lender in each of these transactions was First National, the Respondent.

On September 6, 1984, the Trustee applied to the bankruptcy court for a

subpoena commanding First National to furnish all documents relating to the sale/purchase and loan payoff of the Debtor resulting from his sale of stock in the following banks; Bowling Green Bank and Trust Company, Farmers Deposit Bank of Brandenburg, Citizen's Bank and Trust Company of Glasgow, and First & Farmer's Bank of Somerset. Two months later the requested documents were made available to the Trustee and his attorneys for inspection in Louisville, Kentucky. The Trustee reviewed several hundred documents provided by First National in response to the subpoena.

On May 1, 1985 the Trustee was informed by First National that the Trustee had not been afforded access to all the documentation in the possession of First National, in contravention of the sub-

poena of September 6, 1984. Immediately thereafter, the Trustee, in accordance with Bankruptcy Rule 2004, moved to compel the examination of First National through its designated agents, regarding the acquisition and sale of the Butcher banks financed by First National. An Order was entered by the bankruptcy court setting the examination for June 9, 1985. Notwithstanding the Order, First National informed the Trustee that the officer most involved with these transactions, Leonard V. Hardin, Executive Vice President, Corporate Commercial Banking, would be unavailable for examination until August.

It was not until the deposition of Leonard V. Hardin on August 15, 1985 that the Trustee discovered that First National's action in requiring cross col-

lateralization of previously unsecured debt, less than six (6) months before the filing of the bankruptcy petition, resulted in preferences and fraudulent transfers to First National as defined by 11 U.S.C. §547 and §548. The Trustee filed suit against First National four (4) days later, on August 19, 1985.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS, AFFIRMING THE DISTRICT COURT'S HOLDING THAT BANKRUPTCY RULE 9006(a) WAS INAPPLICABLE TO COMPUTE THE END OF THE TWO-YEAR TIME PERIOD SET FORTH IN 11 U.S.C. §546(a), IS IN CONFLICT WITH OTHER FEDERAL COURT OF APPEALS' DECISIONS AND INCONSISTENT WITH THIS COURT'S DECISION IN UNION NATIONAL BANK v. LAMB, 337 U.S. 38 (1949).

The Sixth Circuit Court of Appeals agreed with the District Court that its decision in Rust v. Quality Car Corral, Inc., 614 F.2d 1118 (6th Cir. 1980) required the conclusion that the Trustee's complaint was not timely filed. The court found that § 546(a) of the Bankruptcy Code, which requires an action seeking to avoid preferential and fraudulent transfers to be commenced within two (2) years of the appointment of a Trustee, to be a statute which confers jurisdiction on the bankruptcy court to

hear the case. Being a statute which confers jurisdiction, the district court and court of appeals found that it would be inappropriate to apply Bankruptcy Rule 9006(a) because such application would, in essence, extend the jurisdiction of the bankruptcy court and enlarge the Trustee's substantive rights in violation of 28 U.S.C. §2075 (1982) which empowers the United States Supreme Court "to prescribe by general rules, the forms and process, writs, pleadings, and motions and the practice and procedure in cases under Title 11," but prohibits the application of the Bankruptcy Rules in such a way to abridge, enlarge or modify any substantive right.

In Rust the Sixth Circuit Court of Appeals had the opportunity to construe a statute of limitations applicable to the

Truth and Lending Act, 15 U.S.C. §1640-(e)(1974), amended by 15 U.S.C. §1640-(e)(1982). Plaintiff in Rust entered into an installment sale agreement with Quality Car who in turn assigned its interest in the contract to Provident Bank. On July 1, 1977 Plaintiff filed a complaint alleging that Defendant's extension of credit to finance the transaction had violated several provisions of the Truth and Lending Act. Defendants moved to dismiss arguing that Plaintiff's claim was barred by the applicable statute of limitations, which provides in part:

> Any action to this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one (1) year of the date of the occurrence of the violation.

15 U.S.C. §1640(e) (1982).

Plaintiff asserted that the July 1, 1977 filing was timely because the statute of limitations did not begin to run until July 2, 1976, the day after the transaction. In support of its position, Plaintiff contended that the "one year" period in §1640(e) should be computed by applying Rule 6(a) of the Federal Rules of Civil Procedure which states that the day of the act, event, or default shall not be included in computing the time in which an action must be commenced. Rust, 614 F.2d at 1119.

The court in Rust disagreed with the plaintiff and concluded that nothing in the Truth and Lending Act supported plaintiff's position that the court should construe the term "one year" with reference to Federal Rule of Civil Procedure 6(a). The court reasoned that the

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Truth and Lending Act statute in question created a cause of action and conferred jurisdiction on the federal court, thus if the complaint was not filed within the time period prescribed by the statute, the federal court had no jurisdiction to entertain it. Id.

In noting that Bankruptcy Rule 9006(a) is identical to Rule 6(a) of the Federal Rules of Civil Procedure, the Sixth Circuit Court of Appeals in the present case believed that Rust stood for the proposition that procedural rules, such as Fed.R.Civ.P. 6(a) and Bankr. Rule 9006(a), did not come into play until after a complaint was filed and that since the complaint was not filed within the two year statute of limitations set forth by 11 U.S.C. §546(a) the Trustee's action was not timely filed and thus the

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bankruptcy court did not have jurisdiction to hear it.

The "majority" rule is that Federal Rule of Civil Procedure 6(a), which excludes final Saturdays, Sundays, and other legal holidays, is applicable to federal statutes of limitations. Wright & Miller, Federal Practice & Procedure, §1163 p. 465-470 (1969). Although reference to Rule 6(a) of the Federal Rules of Civil Procedure was not determinative of the present case before the court, it is instructive as much as Bankr. Rule 9006(a) applies the identical phraseology as Federal Rule of Civil Procedure 6(a) to compute time periods created by statutes of limitations. Federal Rule of Civil Procedure 6(a) and its interpretive case history was also relied on by the

court of appeals by analogy in the present case.

The analysis and conclusions of law espoused by Rust and relied on by the Sixth Circuit Court of Appeals in the present case is in conflict with other federal circuit court of appeals' decisions and is inconsistent with this Court's holdings in Union National Bank v. Lamb, 337 U.S. 38 (1949) and Zipes v. TransWorld Airlines, Inc., 455 U.S. 385 (1982).

In Kane v. Douglas Elliman, Hollyday and Ives, 635 F.2d 141 (2d Cir. 1980) the Second Circuit Court of Appeals held that the ninety (90) day limitation period for filing a discriminatory employment complaint after receipt of the notice of right to sue from the Equal Employment Opportunity Commission on January 28,

1980, did not end on a Sunday, but ran until the end of the next day or Monday, April 28, 1980, and that therefore the complaint was timely filed. Civil Rights Act of 1964, §701 et. seq., 706(e) as amended 42 U.S.C.A. §§2000e et. seq., 2000e(f)(1). The court of appeals noted that "Title VII was passed by a Congress with Rule 6(a) firmly in mind" and that therefore it should be applied to extend the limitations period to the Monday following the Sunday on which the limitations period expired. Id. at 142.

In Frey v. Woodward, 748 F.2d 173 (3rd Cir. 1984), the Third Circuit Court of Appeals applied Federal Rule of Civil Procedure 6(a) to the computation of the time period of 28 U.S.C. §2401(b) under the Federal Torts Claim Act noting that §2401(b) did not contain a computation

rule of its own and that it said nothing about weekends or holidays. Id. at 175. The court concluded that Federal Rule of Procedure 6(a) provided certainty, if uniformally applied, and noted that such a position has been adopted by this Court in interpreting 28 U.S.C. §2101(c)(1982), in Union National Bank v. Lamb, 337 U.S. 38 (1949), see infra.

In Hart v. United States, 817 F.2d 78 (9th Cir. 1987), the Ninth Circuit Court of Appeals raised the issue of subject matter jurisdiction sua sponte to determine whether the six month statute of limitations of 28 U.S.C. §2401(b) of the Federal Torts Claim Act had expired. The court noted that the six month statute of limitation expired on November 30, 1985, which fell on a Saturday. The court found however that Federal Rule of

Civil Procedure 6(a) provided that in computing the time allowed under "any applicable statute," when the final day falls on a Saturday, Sunday, or legal holiday, the time period extends to the first day following those days. The court thus held that Hart had until December 2, 1985 to file his case in the district court which properly had jurisdiction. Id. at 80.

In Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982), the Eleventh Circuit Court of Appeals held that Federal Rule of Civil Procedure 6(a) should be applied to the time requirements found in the Civil Rights Act of 1964, §706(f)(1), 717(c) as amended 42 U.S.C.A. §§2000e-5(f)(1), 2000 e-16(c). The court in Milam reversed the district court's opinion that the court lacked

jurisdiction because of the complainant's failure to file his complaint timely, the court finding that timely filing was not a prerequisite to federal jurisdiction, citing this Court's decision in Zipes v. Independent Federation of Flight Attendants, 455 U.S. 385 (1982). The court concluded "that the intent of Congress in passing §2000e-16(c) was to adopt the provisions of Rule 6(a) allowing a party to file suit the day following a weekend or holiday if a time period for filing ended on a weekend or holiday." Milam, 674 F.2d at 862.

In Banks v. Chesapeake and Potomac Telephone Co., 802 F.2d 1416 (D.C. Cir. 1986), the District of Columbia Circuit Court of Appeals found that Federal Rule of Civil Procedure 6(a) applied in computing the District of Columbia's three

(3) year statute of limitations for personal injury actions. The court found that "Federal Rule of Civil Procedure 6(a) directs a federal court, in calculating any time period prescribed by any applicable statute, to extend the period an additional day if the time period ends on a Saturday, a Sunday, or a legal holiday." Id. at 1418. Similarly, the court found that the law in the District of Columbia tolled the limitation period if the last day fell on a Sunday, and thus concluded that the district court erred in finding that the suit would be timed barred under the three-year statute of limitations. Id.

In First State Bank of Miami v. Gotham Provision Company, Inc., (In re Gotham Provision Co., Inc.), 669 F.2d 1000 (5th Cir. 1982), cert. denied, 459

U.S. 858 (1982), the Fifth Circuit Court of Appeals noted that there was a dispute as to whether Federal Rule of Civil Procedure 6(a) applied directly to federal statutes of limitations or whether it may be invoked only by analogy. The court decided not to explore the subtleties of this debate because of its decision in Lawson v. Conyers Chrysler Plymouth & Dodge Trucks, Inc., 600 F.2d 465 (5th Cir. 1979), which directly conflicted with Rust and found, "this court has consistently used Rule 6(a)'s method for computing federal statutory time limitations." In re Gotham, 669 F.2d at 1014. The Lawson case involved the same issue as Rust; whether the day on which an act was performed should be counted in calculating the time limitations set forth in the Truth and Lending Act [15 U.S.C.

§1640(e)(1974)]. The court in Gotham found no reason why the method of Rule 6(a) should not be invoked for the purposes of computing the (30) day notice of filing period prescribed by §206 of the Packers & Stockyards Act, 1921, §§1 et. seq. 206 as amended 7 U.S.C.A. §181 et. seq., 196. The court noted that the justification offered by this Court in Lamb, for applying the method of Rule 6(a) in connection with 28 U.S.C. §2101(c) had equal force here; "since the Rule had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the consideration of liberality and leniency which find expression in Rule 6(a) are equally applicable . . . to the statutory time period invoked

here." Id., quoting Lamb, 337 U.S. at 41.

Although the circuit court cases cited above only establish that Rust is the minority position when reviewing the application of Federal Rule 6(a) to federal statutes of limitations, it is relevant here because of the Sixth Circuit Court of Appeals' reliance on Rust to affirm the district court's holding that Bankrutpcy Rule 9006(a), which is duplicate of Federal Rule of Civil Procedure 6(a), was not applicable to 11 U.S.C. §546(a) of the Bankruptcy Code, which is simply another statute of limitation established by Congress. Rust was decided before the implementation of the Bankruptcy Rules on August 1, 1983 and in adopting the language of Federal Rule of Civil Procedure 6(a), Bankruptcy

Rule 9006(a) retains the phrase "or by any applicable statute" in the face of the majority rule applying the identical Rule 6(a) phrase in the computation of other federal statutes of limitation. See Generally, Wright & Miller, Federal Practice & Procedure, §1163 (1969). Of further significance is the relevant Advisory Committee Note to Bankruptcy Rule 9006(a) stating: "this rule is an adaptation of Rule 6 F.R.Civ.P. It governs the time for acts to be done and proceedings to be had in cases under the Code and any litigation arising therein." King, Bankruptcy Rules, Collier pamphlet edition, part 2, (1988)(emphasis added).

As the bankruptcy court found in this present case; "This court will not easily assume that the Supreme Court acted beyond its delegated power or that

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Congress permitted to become operative rules affecting substantive rights . . . this court cannot conclude that the application of Bankruptcy Rule 9006(a) in computing a §546(a) limitation period may be said to clearly work an abridgement, enlargement, or modification of any substantive right under the Bankrutpcy Code." Martin v. First National Bank of Louisville, (In re Butcher), 57 B.R. 101, 103 (Bkrtcy. E.D. Tenn. 1985).

Two cases directly on point, one in the Bankruptcy Court for the Eastern District of Pennsylvania, and the other in the District Court for the Southern District of Florida, have addressed the identical issue of Bankrutpcy Rule 9006(a)'s applicability to §546(a) of the Bankruptcy Code and have come to the conclusion that the two year time limi-

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tation expressed in §546(a) should be computed pursuant to Bankrutpcy Rule 9006(a).

In Judson v. International Terminal Operating Co., Inc., (In re Oro Import Company, Inc.), 69 B.R. 6 (Bankr. S.D. Fla. 1986), the debtor filed a voluntary petition under Chapter 7 on May 13, 1983. The trustee was appointed on May 18, 1983 and the appellant-trustee filed an adversary proceeding on May 20, 1985. The bankruptcy judge refused to apply Bankruptcy Rule 9006(a) to §546(a) as a means to determine the method of computing time. The Bankruptcy Court acknowledged "different views" among the courts and chose to follow the decision of the Sixth Circuit in Rust. The District Court reversed noting that Rust was a minority view on the subject and that it was this

circuit's adaptation of the majority view, as expressed in Lawson v. Conyers Chrysler Plymouth & Dodge Trucks, Inc., 600 F.2d 465 (5th Cir. 1979) a case virtually indistinguishable from Rust, whereby Rule 6(a) was applied to the same statute of limitations section of the Truth and Lending Act. The court found that the Lawson decision was binding on the Eleventh Circuit as a Fifth Circuit decision decided prior to October 1, 1981. In re Oro Import Co., 69 B.R. at 8.

In the recent case of Zimmerman v. National Electrical Benefit Fund, (In re Kaelin Associates Elec. Const., Inc.), 70 B.R. 412 (Bkrtcy. E. D. Pa. 1987), the debtor filed a voluntary bankruptcy petition under Chapter 11 on February 9, 1981. The case was then converted to a

Chapter 7 on April 18, 1984. On November 2, 1984 the plaintiff, trustee, was appointed. On November 3, 1986 the trustee commenced various adversary proceedings against defendant based on 11 U.S.C. §547 for preferential transfers. Defendants argued that the proceedings were time barred pursuant to 11 U.S.C. §546(a) as being beyond the two year statute of limitations required by that section. The bankruptcy court rejected the defendant's position, finding that the majority of courts have held that, "unless Congress has expressly stated otherwise, the computational scheme set out in Rule 6 will apply to federal limitation statutes." Id. at 414. The court found that Bankrutpcy Rule 9006(a) should be used to compute the meaning of the phrase "two years" set out in 11

U.S.C. §546(a), noting that there was no legislative history to conclude that Congress intended otherwise. Id. at 415, citing S. Rep. No. 95-989, 95th Cong., 2d Sess. 86 (1978), U.S. Code Cong. and Admin. News 1978, p. 5787.

The majority of the circuit courts' opinions are consistent with this Court's decision in Union National Bank v. Lamb, 337 U.S. 38 (1949), in which a writ of certiorari was applied for one day after the expiration of the ninety (90) day statutory period, the ninetieth (90) day falling on a Sunday. In holding the appeal timely, this Court said:

> Rule 6(a) of the Rules of Civil Procedure, 28 U.S.C.A. provides that where the last day for performance of an act falls on a Sunday or a legal holiday, performance on the next day which is not a Sunday or a legal holiday is timely. [note ommitted.]

That rule provides the method for computation of time prescribed or allowed not only by the rules or by order of court but by "any applicable statute." Since the rule had the concurrence of congress, [footnote ommitted] and since no contrary policy is expressed in the statute governing this review, we think that the consideration of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. §2101(c) [establishing the (90) day period for a writ of certiorari].

337 U.S. at 40-41.

In the case at bar, the jurisdiction of the court as well as the substantive rights of the parties remain unaffected by the application of Bankruptcy Rule 9006(a) to the limitations provision of §546(a). The provision specifying the time for filing an avoidance action does not speak in jurisdictional terms. The time limitation embodied in §546(a) is more in the nature of a procedural bar to the exercise of remedy than a condition of time forming a substantive part of the

statutory rights in question. The jurisdiction of the bankruptcy court is set forth in 28 U.S.C. §1334 and §157(a). By the expressed terms of §1334, the court has original jurisdiction "of all civil proceedings arising under Title 11 or arising or related to cases under Title 11," 28 U.S.C. §1334(b). Jurisdiction is not limited to those actions that were timely filed in accordance with §546(a).

In Zipes v. TransWorld Airlines, Inc., 455 U.S. 385 (1982), this Court examined the legal character of a timely filing requirement in the context of Title VII 42 U.S.C. §§2000e-5(e)(f), holding that "filing a timely charge of discrimination with the Equal Employment Opportunity Commission is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a

statute of limitations, is subject to waiver, estoppel, and tolling." Id. at 393. This Court reasoned that:

> The provision granting district courts jurisdiction under Title VII 42 U.S.C. §§2000e-5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

455 U.S. at 393-94.

In support of its conclusion, this Court canvassed its own cases finding that; "From and after late 1977, all nine justices have concurred in opinions containing dicta using the limitations label to the exclusion of the jurisdictional period." Id. at 396, n.12. The legislative history also evidenced congressional intention that the timely

filing provision operate as a statute of limitations subject to recognized equitable tolling doctrines and not as a restriction on the jurisdiction of the court. See H.R. 1746, The Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167 (1972).

Finally, there are important policy considerations which support the application of Rule 9006(a) in computing the limitations period under the Code. As noted by now former Bankruptcy Judge Clive W. Bare, United States Bankruptcy Court, Eastern District of Tennessee, as currently worded, Rule 9006(a) clearly invites reliance by litigants in calculating the time available within which to exercise their rights. Refusal to apply Rule 9006(a) would be contrary to the appropriately liberal interpretive spirit

here applicable and would, in effect, constitute little more than the setting of a trap for the unwary. In re Butcher, 57 B.R. 101, 103-104. Federal Rule of Civil Procedure 6(a) and Bankruptcy Rule 9006(a) were adopted by this Court in an attempt to clarify the computational formula to be applied, with uniformity, to statutes which invoke time limitations. That Rule, excluding at the front end, the day of the critical event, and at the back end, Saturdays, Sundays, and legal holidays, provides certainty if uniformly applied.

CONCLUSION

The decision of Sixth Circuit Court of Appeals, affirming the District Court's holding that Bankruptcy Rule 9006(a), which excludes the final Saturday, Sunday, and any legal holiday of a

statutory time period, was inapplicable in computing the two-year time limitation set forth in §546(a) of the Bankruptcy Code, is in conflict with other circuit court of appeals' decisions and inconsistent with this Court's opinions in Union National Bank v. Lamb, 337 U.S. 38 (1949) and Zipes v. TransWorld Airlines, Inc., 455 U.S. 385 (1982), and must be reversed.

FOR THESE REASONS, petitioner prays that a writ of certiorari issue to review and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

In re C. H. BUTCHER, Jr., Debtor

James R. MARTIN, Trustee, Plaintiff,

v.

FIRST NATIONAL BANK OF LOUISVILLE,
Defendant.

Bankruptcy No. 3-83-01008
Adv. No. 3-85-1151

United States Bankruptcy Court
E.D. Tennessee.

Dec. 30, 1985

CLIVE W. BARE, Bankruptcy Judge.

Defendant has moved to dismiss as untimely the plaintiff trustee's complaint to avoid certain transfers.

At issue is whether Bankruptcy Rule 9006(a) applies in computing the two-year limitations period made applicable in 11 U.S.C.A. §546(a)(West 1979) to the exercise of avoidance powers under the Bankruptcy Code.

I.

Plaintiff trustee, James R. Martin, was appointed trustee of the debtor's estate on August 17, 1983. On August 19, 1985, the trustee filed this adversary proceeding to avoid alleged preferential transfers under 11 U.S.C.A. §547 (West 1979) and alleged fraudulent conveyances under 11 U.S.C.A. §§544(b) and 548(a) (West 1979).

Defendant asserts that the trustee's action is untimely under Bankruptcy Code §546(a), which provides:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--
>
> 1) two years after the appointment of a trustee under section 702, 1104, 1163, or 1302 of this title; and
>
> 2) the time the case is closed or dismissed.

11 U.S.C. §546(a)(West 1979).

The trustee maintains that the complaint was timely filed, contending that Bankruptcy Rule 9006(a)[1] requires here the exclusion of Saturday and Sunday in computing the two-year period under §546(a).

The complaint was filed on Monday, August 19, 1985.

II.

---

[1]Insofar as here pertinent, this rule provides:

> In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the date of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Bankruptcy Rule 9006(a).

Although 28 U.S.C.A. §2075 (West 1982) empowers the United States Supreme Court "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11," §2075 also specifically makes clear that "[s]uch rules shall not abridge, enlarge, or modify any substantive right." Thus, in Deutscher v. O'Neal Steel Corpcration (In re Enterprise Fabricators, Inc.), 26 B.R. 220 (Bankr. M.D. Tenn. 1983) this court held that Bankruptcy Rule 9006(a) could not be used to enlarge the 90-day preference period under 11 U.S.C.A. §547(b) (West 1979). However, that case did not involve the computation of a period of limitations provided in the Bankruptcy Code.

As noted in Wolff v. Wells Fargo Bank (In re Moralez), 618 F.2d 76 (9th Cir. 1980) (holding Rule 13-307(d) of the prior Rules of Bankruptcy Procedure not an invalid attempt to effect a change in substantive bankruptcy law):

> Following the pattern it had established in the areas of civil procedure, criminal procedure, and admiralty, Congress delegated the authority to draft bankruptcy rules to the Supreme Court, apparently deferring to the Court's competence to formulate rules of practice and procedure. The proposed bankruptcy rules were studied by committees of experts, then adopted by the Supreme Court, and became effective only after submission to Congress for review. Consequently, . . . [a litigant] has a "heavy burden" of showing that . . . [a bankruptcy rule] deals with matters of substance rather than procedure. [citations omitted] It cannot be assumed easily that the Supreme Court acted outside the power delegated to it under §2075, or that Congress allowed rules to become operative which would effect substantive rights.

618 F.2d at 78.

Defendant cites and relies upon the Sixth Circuit's holding in Rust v. Qua-

lity Car Corral, Inc., 614 F.2d 1118 (6th Cir. 1980). In Rust the court held that Rule 6(a) of the Federal Rules of Civil Procedure did not apply to exclude the day of the occurrence of the violation in computing the one-year statute of limitations under the Truth in Lending Act. In so holding, the Sixth Circuit apparently followed what has been called the "minority view" that Fed.R.Civ.P. 6(a) is not applicable in computing federal statutes of limitation. See C. Wright & A. Miller, Federal Practice and Procedure §1163 (1969).

This court is asked to conclude that Rust compels a holding that applying Bankruptcy Rule 9006(a) to compute periods of limitation under the Bankruptcy Code constitutes an impermissible encroachment of a procedural rule upon

substantive bankruptcy provisions. This court cannot so conclude. Rust was decided before the implementation of the Bankruptcy Rules on August 1, 1983. It is noteworthy that in its adaptation of Fed.R.Civ.P. 6(a), Bankruptcy Rule 9006-(a) retains the phrase "or by any applicable statute" in the face of a "majority rule" applying the identical Rule 6(a) phrase in the computation of federal statutes of limitation. See generally Wright & Miller, supra. Of further significance is the relevant Advisory Committee Note stating: "This rule is an adaptation of Rule 6 F.R.Civ.P. It governs the time for acts to be done and proceedings to be had in cases under the Code and any litgation arising therein." Bankruptcy Rule 9006(a) advisory committee note. These rules were studied by

committees of experts, adopted by the Supreme Court, and became effective only after submission to Congress for review. This court will not easily assume that the Supreme Court acted beyond its delegated power or that Congress permitted to become operative rules affecting substantive rights.

Further noteworthy is the argument that the time limitation embodied in §546(a) is more in the nature of a procedural bar to the exercise of a remedy than a condition of time forming substantive part of the statutory rights in question. Given some room for difference of opinion as to the precise nature of periods of limitations in this respect,[2]

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[2]A distinction has been drawn between statutes of limitations, which merely cut off the remedy (e.g. to enforce a right existing at common law), and so-called conditions as to time

embodied in statutes which create a right of action not existing at common law and restricting the time within which an action may be brought to enforce the right. The former have been called procedural while the latter have been deemed part of the substantive law creating the right of action. See generally 51 Am.Jur.2d Limitation of Actions §§15, 21 (1970).

However, in other contexts (e.g. permitting an amendment extending a statutory time limitation to allow an action on a statutorily-created right already time-barred by the previously applicable time limitation) it has been said:

Statutes of limitations generally cut off the remedy without extinguishing the right. [citation omitted] This may be true even though the limitation is contained in the same statute that creates the substantive liability. American Pipe & Construction Co. v. Utah, 414 U.S. 538, 556-59, 94 S.Ct. 756, 767-69, 38 L.Ed.2d 713 (1974). The question is one of legislative intent.

Osmundsen v. Todd Pacific Shipyard, 755 F.2d 730, 733 (9th Cir. 1985).

See also Davis v. Valley Distributing Company, 522 F.2d 827 (9th Cir. 1975):

Even though the limitations provi-

sion is contained in the same statute that created the substantive liability, it does not necessarily measure the right. [citations omitted] The question remains one of legislative intent.
. . . There is no reason to believe that Congress departed from the general rule that statutes of limitations go to matters of remedy only when it passed the 1964 Act, and "in creating a liability also put a period to its existence." [citations omitted]

522 F.2d at 830 n. 7.

And in Chase Securities v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945) (holding that a state legislature's amendment of a statute of limitation so as to restore a remedy lost through mere lapse of time did not violate defendant's Fourteenth Amendment rights) the Supreme Court observed:

Statutes of limitations always have vexed the philosophical mind for it is difficult to fix them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a "right" a claim that can find no remedy for its invasion. On the other hand, some com-

this court cannot conclude that the application of Bankruptcy Rule 9006(a) in computing the §546(a) limitations period

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mon-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims. . . . . They represent a public policy about the privilege to litigate.

This Court . . . adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitations go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.

325 U.S. at 313-14, 65 S.Ct. at 1142.

may be said to clearly work an abridgement, enlargement or modification of any substantive right under the Bankruptcy Code.

Finally, important policy considerations support the application of Rule 9006(a) in computing limitations periods under the Code. As currently worded, Rule 9006(a) clearly invites reliance by litigants in calculating the time available within which to exercise their rights. Refusal to so apply Rule 9006(a) would be contrary to the appropriately liberal interpretative spirit here applicable and would, in effect, constitute little more than the setting of a trap for the unwary. See Wright & Miller, supra at p. 614.

Plaintiff's action was timely com-

menced. Accordingly, defendant's motion to dismiss is denied.

SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF TENNESSEE
NORTHERN DIVISION

IN RE:	)	
	)	
C.H. BUTCHER, JR.,	)	Case No.
	)	3-83-01008
Debtor	)	
	)	
JAMES R. MARTIN, TRUSTEE,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	Civ. 3-86-054
FIRST NATIONAL BANK OF LOUISVILLE,	)	
	)	
Defendant	)	

ORDER

For the reasons set forth in the memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that the Order entered by the United States Bankruptcy Court for the Eastern District of Tennessee on December 30, 1985, denying defendant's motion to dis-

miss, be, and the same hereby is, REVERSED whereby defendant's motion to dismiss is now GRANTED and this case is hereby DISMISSED. It if further ORDERED that the defendant's motion to strike [Doc. 9] is hereby DENIED AS MOOT.

The Clerk is hereby ORDERED to return the record to the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, within thirty (30) days from the date of this Order unless an appeal is taken therefrom.

ENTER:

/s/
James H. Jarvis
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF TENNESSEE
NORTHERN DIVISION

IN RE:	)	
	)	
C.H. BUTCHER, JR.,	)	Case No.
	)	3-83-01008
Debtor	)	
	)	
JAMES R. MARTIN, TRUSTEE,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	Civ. 3-86-054
FIRST NATIONAL BANK OF LOUISVILLE,	)	
	)	
Defendant	)	

MEMORANDUM

This action presents an appeal from an Order ["Order"] entered by the United States Bankruptcy Court for the Eastern District of Tennessee on December 30, 1985, denying the motion to dismiss of defendant First National Bank of Louisville ["First National"]. On March 4,

1986, this Court granted First National['s] leave to appeal the Order because the Order involved a controlling question of law to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. 28 U.S.C. §1292(b). [Doc. 5]. Oral argument was heard on May 21, 1986. Only one question is presented by this appeal: Whether or not the trustee complied with the applicable statute of limitations, 11 U.S.C. §546(a) in filing this action.

Statement of the Case

James R. Martin was appointed Trustee ["Trustee"] of the Estate of the Debtor, C. H. Butcher, Jr., on August 17, 1983. On August 19, 1985, the Trustee

filed his complaint in the United States Bankruptcy Court for the Eastern District of Tennessee, bringing claims against First National seeking to avoid preferential transfers to First National under 11 U.S.C. §547 (1979) and fraudulent transfers under 11 U.S.C. §§544(b) and 548(a) (1979) in the aggregate of $1,986,204.22.

In response to the Trustee's complaint, First National filed a motion to dismiss, contending that the action was barred by the applicable statute of limitations, 11 U.S.C. §546(a)(1979), which provides:

> An action or proceeding under Section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of -
>
> 1) Two years after the appointment of a trustee under Section 702, 1104, 1163, or 1302 of this title; and
>
> 2) The time the case is closed or dismissed.

11 U.S.C. §546(a)(1979). The Trustee, of course, argued that the complaint was timely filed, contending Bankruptcy Rule 9006(a)[1] requires the exclusion of Saturday and Sunday in computing the two-year period under Section 546(a).

The Bankruptcy Court agreed with the Trustee and denied First National's motion by a Memorandum and Order entered on December 30, 1985, in which it applied

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[1]In pertinent part, this rule provides:

> In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Rule 9006(a) of the Rules of Bankruptcy Procedure.

LAW

First National primarily relies on Rust v. Quality Car Corral, Inc., 614 F.2d 1118 (6th Cir. 1980) in support of its position. In Rust, the Sixth Circuit was confronted with a fact situation which required them to construe 15 U.S.C. §1640(e), the statute of limitations applicable to the Truth in Lending Act, 15 U.S.C. §1601, et seq. The District Court had dismissed the action based upon the one-year statute of limitations contained in Section 1640(e) and the Sixth Circuit affirmed. The pertinent facts of Rust as set forth by the Sixth Circuit are as follows:

> On July 1, 1976, plaintiff entered into an installment sale agreement with defendant Quality Car Corral, Inc. Quality Car subsequently assigned

its interest in the contract to defendant Provident Bank. On July 1, 1977, Rust filed a complaint in district court. He alleged that defendants' extension of credit to finance the transaction had violated various provisions of the Truth in Lending Act.

Defendants moved to dismiss, contending that Rust was barred from suit for failure to bring his claim within the one year statute of limitations.

Id., at 1119.

The precise issue in Rust is whether or not the statutory limitations period had expired when Rust filed his claim on July 1, 1977. The applicable statute of limitations in Rust, 15 U.S.C. §1640(e) provides in pertinent part as follows:

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of occurrence of the violation (emphasis added).

15 U.S.C. §1640(e).

Rust argued that the "one year" should be computed by applying Rule 6(a)

of the Federal Rules of Civil Procedure, which is essentially codified in Rule 9006(a) of the Rules of Bankruptcy Procedure, supra. Rust then posited that the July 1, 1977 filing was timely because the statute of limitations did not begin to run until July 2, 1976, the day after the installment sale was entered into, because Rule 6(a) of the Federal Rules of Civil Procedure clearly states that "[i]n computing any period of time . . . allowed . . . by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included . . ."

Nevertheless, the Sixth Circuit agreed with the holding of the District Court that the language of Section

1640(e) precluded adoption of Rust's position and stated as follows:

> The phrase "within one year from the date of occurrence" is straightforward. Nothing in that language supports judicial implication of a lapse in time between the "occurrence" and the date the statute of limitations begins to run. In the context of this case, the alleged violations took place on July 1, 1976. To obtain relief under the Act, Rust had one year - 365 days - beginning on the date of the transaction to file his complaint. The last day of that year was June 30, 1977.

[Id. at 1119-20].

Obviously, the Rust case can be distinguished from the instant case since different statutes are involved. More to the point, the Trustee maintains that the statute in question in Rust, 15 U.S.C. §1640(e), is both a statute of limitations and a jurisdictional grant, whereas the statute in question in the instant case, §546(a), is procedural only - it does not confer jurisdiction. Thus, the

Trustee would have this Court fashion a rule by which judges determine the applicability of Rule 6 or Bankruptcy Rule 9006 by discovering whether or not the grant of jurisdiction and creation of the limitation period occur in the same paragraph or numerical section of the statutory scheme. This, the Court refuses to do for the following reasons:

First, the Court is of the opinion that the Sixth Circuit in Rust did not refuse to apply Rule 6(a) because of any compositional or linguistic peculiarities of the Truth in Lending Act. To the contrary, the Court agrees with First National that the Rust court was dealing in general with the relationship between Rule 6(a) and federal statutes. In particular, the Court stated:

> We believe, however, that defendants have expressed the better view

of the relationship between a federal statute and Rule 6(a). The Truth in Lending Act creates a cause of action and confers jurisdiction on federal courts to hear cases arising under the statute. That jurisdiction is defined and circumscribed by the Act itself, in a temporal as well as a substantive sense. If a complaint is not filed within the time period prescribed by 15 U.S.C. §1640(e), a federal court has no jurisdiction to entertain it.

Id., at 1119. Citing Rule 82 of the Federal Rules of Civil Procedure, the Court went on to note that procedural rules merely "govern procedural matters once an action is properly before the Court." [Id.].

Accordingly, based on the above language of Rust, the Court is compelled to agree with the position of First National that Rust stands for the proposition that procedural rules such as Rule 6(a) and Bankruptcy Rule 9006(a) do not come into play until after the Plaintiff has timely filed his complaint. In the

words of counsel for First National, "A Procedural rule that first springs into life on Monday cannot be invoked to resurrect a cause of action that expired on Friday, Saturday or Sunday." [Doc. 7, p. 1]. The Court believes that the underlying message of Rust is that procedural rules such as Rule 6(a) and Bankruptcy Rule 9006(a) properly extend time periods prescribed by the rules or by any applicable statute once the action has commenced, but they cannot enlarge ex post facto the time for commencing the action itself. Therefore, because the Trustee filed his complaint three days after expiration of the two-year period established by 11 U.S.C. §546, the Court is constrained to hold that the Trustee never properly commenced this action, thereby conferring jurisdiction on the

Bankruptcy Court. Thus, neither Rule 9006(a) nor any other rule of procedure can save his cause of action.

The Court would further note that its conclusion is buttressed by certain language set forth in both Rule 6(a) and Rule 9006(a). Both rules refer to computing periods of time allowed "by any applicable statute." This language is unquestionably broad enough to encompass the statute in question in Rust, i.e., the Truth in Lending Act, and the statute in question in the case sub judice. Yet, the Rust court chose to conclude otherwise for the same reasons this Court is now compelled to do so.

As a final matter, the Court concurs with the opinion of the learned Bankruptcy Judge that, as currently worded, Rule 9006(a) clearly invites reliance by

litigants in calculating the time available within which to exercise their rights. Moreover, the Court agrees with the Bankruptcy Court that its conclusion comports with the liberal spirit of the federal rules in their quest to avoid "setting traps for the unwary." See, Wright & Miller, Federal Practice and Procedure, §1163 at 614 (1969). Nevertheless, the Court is constrained to hold as it has based on the clear meaning of Rust and the fact that neither this Court nor the Bankruptcy Court nor the Trustee has been able to effectively distinguish Rust so as to confer jurisdiction on the Bankruptcy Court when the Trustee did not file within the applicable statue of limitations.

Thus, the decision of the Bankruptcy Court must be REVERSED, and the motion to dismiss filed by First National must be GRANTED and this case must be DISMISSED.

Order accordingly.

/s/
James H. Jarvis,
UNITED STATES DISTRICT JUDGE

APPENDIX C

NO 86-5850

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE C. H. BUTCHER, JR.,

Debtor

JAMES R. MARTIN, TRUSTEE

Plaintiff-Appellant,

v.

FIRST NATIONAL BANK OF LOUISVILLE,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF TENNESSEE

Decided and Filed September 23, 1987

Before: KENNEDY and NELSON, Circuit

Judges; and CELEBREZZE, Senior Circuit Judge.

KENNEDY, Circuit Judge. Plaintiff-trustee ("Trustee") appeals from a judgment dismissing his complaint seeking to avoid preferential and fraudulent transfers to First National Bank of Louisville ("First National"). The Trustee was appointed on August 17,1983, and the complaint was filed on August 19, 1985. The District Court granted First National's motion to dismiss, concluding that the action was barred by the two year statute of limitations, 11 U.S.C. §546(a). We affirm.

On June 24, 1983, an involuntary bankruptcy petition seeking relief under Chapter 7, title 11, was filed against C. H. Butcher, Jr. in the United States Bankruptcy Court for the Eastern District

of Tennessee.[1] The Trustee commenced a proceeding against First National on August 19, 1985, seeking to avoid preferential transfers to First National under 11 U.S.C. §547(b)(1982) and fraudulent transfers to First National under 11 U.S.C. §§544(b) and 548(a)(1982). In response, First National filed a motion to dismiss arguing that the action was barred by the statute of limitations, which provides:

> An action or proceeding under section 544,545, 547, 548, or 553 of this title may not be commenced after the earlier of--

---

[1]Because the case was commenced before the effective date of the Bankruptcy Amendments of 1984, reference to Bankruptcy Code sections are to the Code as it existed prior to the passage of the 1984 Amendments.

1) two years after the appointment of a trustee under section 702, 1104, 1163, or 1302 of this title; and

2) the time the case is closed or dismissed.

11 U.S.C. §546(a)(1982).

The bankruptcy court denied First National's motion. It determined that Bankruptcy Rule 9006(a)[2] applied to the computation of the statute of limitations period because the application of Rule 9006(a) to the two-year period did not

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[2]Rule 9006(a) provides:

In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Rules of Bankruptcy Procedure 9006(a).

enlarge the Trustee's substantive right.[3] Accordingly, the court did not include the day of the Trustee's appointment in the computation of the two-year period, which placed the end of the period on Saturday, August 17, 1985. The court also found that Bankruptcy Rule 9006(a) extended the limitations period to the end of the next business day since the two-year period expired on a Saturday. Thus the court concluded that the action

---

[3]The court recognized that 28 U.S.C. §2075 (1982) empowers the United States Supreme Court "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11." Furthermore, the court noted that §2075 makes clear that "[s]uch rules shall not abridge, enlarge, or modify any substantive right." The court believed that because the Bankruptcy Rules were submitted to Congress and adopted by the Supreme Court, the application of Rule 9006(a) to the limitations period contained in §546(a) did not enlarge the Trustee's substantive rights.

was timely filed and denied First National's motion to dismiss. The District Court granted First National's motion for leave to immediately appeal pursuant to 28 U.S.C. §1292(b).

The District Court reversed, relying on this Court's decision in Rust v. Quality Car Corral, Inc., 614 F.2d 1118 (6th Cir. 1980). The Rust Court construed the statute of limitations applicable to the Truth in Lending Act, 15 U.S.C. §§1601-1693r (1982 & Supp. III 1985). Plaintiff in Rust entered into an installment sale agreement with Quality Car on July 1, 1976. Quality Car assigned its interest in the contract to defendant Provident Bank. On July 1, 1977, plaintiff filed a complaint alleging that defendants' extension of credit to finance the transaction had violated several pro-

visions of the Truth in Lending Act. Defendants moved to dismiss arguing the plaintiff's claim was barred by the applicable statute of limitations, which provides in pertinent part:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

15 U.S.C. §1640(e)(1982)(emphasis added). Plaintiff asserted that the July 1, 1977 filing was timely because the statute of limitations did not begin to run until July 2, 1976, the day after the transaction. In support of his position, plaintiff contended that the "one year" period in section 1604(e) should be computed by applying Rule 6(a) of the Federal Rules of Civil Procedure, which states that the day of the act, event or default shall

not be included in computing the time in which an action must be commenced.[4]

This Court disagreed, and concluded that nothing in the Truth and Lending Act supported plaintiff's position that the Court should construe the term "one year" in the Truth in Lending Act with reference to Fed.R.Civ.P. 6(a). The Court reasoned,

> [t]he Truth in Lending Act creates a cause of action and confers jurisdiction on federal courts to hear cases arising under the statute. That jurisdiction is defined and circumscribed by the Act itself, in a temporal as well as a substantive sense. If a complaint is not filed within the time period prescribed by 15 U.S.C. §1640(e), a federal court has no jurisdiction to entertain it.

614 F.2d at 1119.

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[4]Bankruptcy Rule 9006(a) is identical to Rule 6(a).

The Court also reasoned that Fed. R. Civ P. 6(a) does not change the premise that a complaint must be filed within the time prescribed by section 1640(e) in order for the court to have jurisdiction. The Court emphasized that Fed.R.Civ.P. 82 demonstrates that the Rules of Civil Procedure are to govern procedural matters once an action is properly before a court. Accordingly, the Court concluded that plaintiff had one year beginning on the date of the transaction to file his complaint; the last day of that year was June 30, 1977.

614 F.2d at 1119-20.

The Trustee argued to the District Court that the Rust case was distinguishable because the statute in question in Rust is both a statute of limitations and a jurisdictional grant, whereas section

546(a) of the Bankruptcy Code is procedural only. Nevertheless, the court believed that this Court in Rust did not base its conclusion on whether the creation of the limitations period and the jurisdictional grant occur in the same paragraph or numerical section of the statutes. Rather, the court viewed our decision in Rust to deal with the relationship between Rule 6(a) and federal statutes in general. Accordingly, the court believed that Rust stands for the proposition that procedural rules such as Rule 6(a) and Bankruptcy Rule 9006(a) do not come into play until after a plaintiff's complaint is timely filed. The court concluded that these rules extend time periods prescribed by the rules or by any applicable statute once the action has commenced, but they do not enlarge ex

post facto the time for commencing the action itself. Because the Trustee filed his complaint three days after the expiration of the two-year period, the court held that the Trustee never properly commenced the action and the bankruptcy court never had jurisdiction.[5] Martin v. First National Bank, No. 3-86-054, slip op. at 6-7 (E.D. Tenn. 1986).

I.

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[5]The court further noted that Rule 6(a) and Bankruptcy Rule 9006(a) refer to computing periods of time allowed "by any applicable statute." Although this language was broad enough to encompass the statute in question in Rust, this Court concluded that the reference to "any applicable statute" did not include the Truth in Lending Act. The District Court also believed that this Court's holding in Rust compels the conclusion that this language was inapplicable to section 546(a) of the Bankruptcy Code.

The Trustee raises several arguments on appeal in support of his position that the complaint was timely filed. First, he asserts that Bankruptcy Rule 9006(a) should be applied to find that the limitations period did not expire until August 19, 1985, because the Rule would not be applied in a manner that would either enlarge or limit his substantive rights since identification of avoidable transfers is fixed at the time of the filing of the bankruptcy petition. This he argues is consistent with 28 U.S.C. §2075 (1982), which empowers the United States Supreme Court "to prescribe by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in cases under Title 11," but prohibits the application of the Bankruptcy Rules in such a way as

to abridge, enlarge, or modify any substantive right. Second, the trustee asserts that after the filing of the petition which commences the case, all time periods under the Code are to be computed by reference to Bankruptcy Rule 9006(a).

The Trustee further asserts that this Court's reasoning in Rust is inapposite to the resolution of the present case. According to the Trustee, the Rust Court analyzed the relationship between a federal statute and Rule 6(a). However, the issue presented in the present case is the interpretation of Bankruptcy Rule 9006(a), a rule promulgated for the express purpose of governing the practice and procedure of Bankruptcy cases, and section 546(a) of the Bankruptcy Code. He also contends that the holding in Rust was based on the fact that the statute of

limitations contained in the Truth in Lending Act was also a jurisdictional grant. According to the Trustee, section 546(a) of the Bankruptcy Code is not a jurisdictional grant because the jurisdiction of the bankruptcy court is set forth in 28 U.S.C. §§1334 and 157(a) and the substantive rights of the Trustee are defined by sections 547 and 548 of the Bankruptcy Code. Jurisdiction is not limited to those actions that were filed in accordance with section 546(a) and this section is merely a procedural limitation upon the substantive rights of the Trustee.

The Trustee also contends that Union National Bank v. Lamb, 337 U.S. 38 (1949), supports his interpretation. In Lamb, a writ of certiorari was applied for one day after the expiration of the

ninety-day statutory period, the ninetieth day fell on a Sunday. The Court, relying on Fed.R.Civ.P. 6(a), held that the writ was timely filed because the statute governing the Court's review contained no policy prohibiting the application of Rule 6(a). Id. at 40-41.[6] The Court also relied on the language in Fed.R.Civ.P. 6(a) providing that this Rule governs the method for computation

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[6]The Trustee argues that Rust is consistent with Lamb because Fed.R.Civ.P. 82 provides that the Federal Rules of Civil Procedure shall not be used to limit or extend the jurisdiction of the United States district courts and the application of Rule 6(a) to the Truth in Lending Act's statute of limitations period would be contrary to this policy.

The Trustee also relies on Kane v. Douglas, Elliman, Hollyday & Ives, 635 F.2d 141 (2d Cir. 1980), where the Second Circuit held that Rule 6(a) applies to the computation of the limitations period of Title VII for filing a discriminatory employment complaint. Id. at 142.

of time prescribed by "any applicable statute."

First National contends that it is impossible to articulate a principaled distinction between Rust and the present case: both cases involve the relationship between a procedural rule and a statute of limitations. First National emphasizes that the statute authorizing the promulgation of the Bankruptcy Rules, like the statute authorizing the promulgation of the Federal Rules of Civil Procedure, states that the Rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. §2075. The cause of action in the present case, like the cause of action in Rust, is created by statute, and a statute of limitations is a restriction on the substantive right created by Congress. Thus, according to

First National, extending the time in which to file a cause of action beyond the two-year period enlarges the Trustee's substantive rights.[7] First National also argues that a bankruptcy court does not obtain jurisdiction over a defendant until the filing of a timely complaint and the service of summons in accordance with Part VII of the Bankruptcy Rules.

We agree with the District Court that our decision in Rust requires the conclusion that the Trustee's complaint

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[7]First National also asserts that the word "applicable" in Bankruptcy Rule 9006(a) and Fed.R.Civ.P. 6(a) evinces congressional intent for these rules not to control computation of time for all federal statutes. First National believes that Fed.R.Civ.P. 6(a) was correctly applied to the computation of time for filing a certiorari petition in Lamb because the application of Rule 6(a) did not affect the substantive rights of the parties inasmuch as the cause of action had been timely filed.

was not timely filed. The Rust Court concluded that the district court was without jurisdiction to hear a cause of action under the Truth in Lending Act because the complaint was not filed within 365 days of the date of the transaction. Section 1640(e), the statute of limitations in the Truth in Lending Act, requires complaints to be filed "within one year from the date of the occurrence of the violation." The Court reasoned that the Truth in Lending Act creates a cause of action and confers jurisdiction on federal courts to hear cases arising under the Act.[8]

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[8]In Hilliard v. United States Postal Service, 814 F.2d 325 (6th Cir. 1987), the district court granted defendant's motion to dismiss plaintiff's discrimination complaint for failure to file suite during the 30-day limitations period of 5 U.S.C. §7703(b)(2). Plaintiff filed his complaint on the thirty-first day after the agency rendered its decision finding

Similarly, section 546(a) of the Bankruptcy Code requires an action seeking to avoid preferential and fraudulent transfers to be commenced within two years after the appointment of the trustee. Like the Truth in Lending Act, the Bankruptcy Code creates a cause of action an confers jurisdiction on federal courts to hear cases arising under the Code. If a complaint seeking to avoid a preferential or fraudulent transfer is not filed in accordance with section 546(a), a bankruptcy court has no jurisdiction to hear the action.

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that the discharge was proper, the thirtieth day falling on a Sunday. This Court held that the 30-day limitations period for filing an appeal of the agency's decision is a jurisdictional prerequisite. Id. at 327. Relying on Rust, the Court concluded that Fed.R. Civ.P. 6(a) could not be applied to extend the limitations period.

Because Bankruptcy Rule 9006(a) does to extend or limit the jurisdiction of the bankruptcy court, see 28 U.S.C. §2075, it does not alter our conclusion that a complaint must be filed within two years from the date of the trustee's appointment. The two-year limitations period begins to run on the date of the trustee's appointment and expires twenty-four months later, irrespective of whether the last day falls on a Saturday, Sunday, or holiday.[9] Like the Federal Rules of Civil Procedure, the Bankruptcy Rules govern procedural matters after a proceeding has been timely commenced. Jurisdiction must arise from section

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[9]Bankruptcy Rule 5001 provides that bankruptcy courts are deemed always open for the purpose of filing any pleading or other paper.

546(a) without reference to Bankruptcy Rule 9006(a).

The Trustee's argument that the filing of the petition gives a bankruptcy court jurisdiction to hear the present case is without merit. As First National emphasizes, it is the filing of a timely complaint and the service of summons in accordance with Part VII of the Bankruptcy Rules that gives a bankruptcy court jurisdiction over the cause of action to avoid the preference. Because the Trustee's complaint was not filed by Friday, August 16, 1985, two years after the date of the Trustee's appointment, we believe that the bankruptcy court had no jurisdiction to hear the cause of action.

II.

The Trustee also argues that the limitations period should be tolled until he discovered the fraud. The Trustee did not, however, raise this issue before the bankruptcy court or the District Court. Thus, we will not consider it for the first time on appeal. See Wright v. Holbrook, 794 F.2d 1152 (6th Cir. 1986).

III.

Accordingly, the judgment of the District Court is AFFIRMED.

Supreme Court, U.S.
FILED
JAN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-997

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

IN RE: C.H. BUTCHER, JR., - - - Debtor,

JAMES R. MARTIN, TRUSTEE, - - Petitioner,

versus

FIRST NATIONAL BANK OF LOUISVILLE, KENTUCKY, - - Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the decision by the Sixth Circuit Court of Appeals that Bankruptcy Rule 9006(a) cannot be used to extend the two-year limitations period prescribed by 11 U.S.C. § 546(a) merits, under the criteria set forth in Supreme Court Rule 17, review by the United States Supreme Court.*

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*In compliance with Supreme Court Rule 28.1, respondent lists its parent companies, subsidiaries and affiliates as follows: First Kentucky National Corporation; First Kentucky Trust Company; First National Bank, Louisville; CommerceNational Bank, Lexington; The Third National Bank of Ashland; The American National Bank and Trust Company, Bowling Green; Central Bank and Trust Company, Owensboro; Mutual Trust Bank, New Albany, Indiana; First Kentucky Company; First Kentucky Investment Advisors, Inc.; Churchill Insurance Agency, Inc.; First National Properties, Inc.; First Kentucky National Trading Company; First Kentucky National Charitable Foundation, Inc.; National Processing Company, Inc.; First Premises Corporation; Second Premises Corporation; Churchill Leasing Corporation; First Louisville Leasing Corporation; First National Broadway Corp.; FNB Service Corporation; FKYN Brokerage, Inc.; and Longue Vue, Inc., Mississippi. There are no parties other than those stated in the caption.

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No. 87-997

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

IN RE: C. H. BUTCHER, JR., - - - *Debtor,*

JAMES R. MARTIN, TRUSTEE, - - *Petitioner,*

v.

FIRST NATIONAL BANK OF LOUISVILLE, KENTUCKY, - - - - - *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent First National Bank of Louisville ("First National") responds as follows to the Petition for Writ of Certiorari filed by James R. Martin, Trustee in Bankruptcy for the Estate of C. H. Butcher, Jr., (the "Trustee"):

COUNTERSTATEMENT OF THE CASE

This case originated as an adversary proceeding filed against First National by the Trustee in the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division. Mr. James Martin had been appointed trustee of the Estate of

Mr. C. H. Butcher, Jr., on August 17, 1983. On August 19, 1985, the Trustee filed his complaint against First National under sections 548(a), 544(b), and 547(b) of the Bankruptcy Code (11 U.S.C.).

Section 546(a) of the Bankruptcy Code, 11 U.S.C. § 546(a), provides that "[a]n action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of (1) two years after the appointment of a trustee under section 702, 1104, 1163, or 1302 of this title; or (2) the time the case is closed or dismissed." When one includes August 17, 1983 in computing the two-year period, the last day on which the Trustee could have filed his complaint was Friday, August 16, 1985. Assuming that Bankruptcy Rule 9006(a) (reproduced in Petition at 4-5) extended his time for filing, the Trustee filed his complaint on the following Monday, three days late.

On September 20, 1985, First National filed a motion to dismiss the complaint as barred by the applicable statute of limitations contained in section 546(a). In support of its motion, First National relied primarily on *Rust* v. *Quality Car Corral, Inc.*, 614 F. 2d 1118 (6th Cir. 1980), in which the Sixth Circuit held that a rule of procedure cannot be applied to enlarge a federal statute of limitations. The bankruptcy court nevertheless denied First National's motion by a memorandum and order entered on December 30, 1985.

On March 4, 1986, the United States District Court for the Eastern District of Tennessee granted First National leave to appeal from the order of the bank-

ruptcy court pursuant to 28 U.S.C. § 1292(b). The district court heard oral argument on May 21, 1986 on the single question of whether the Trustee had complied with the applicable statute of limitations, 11 U.S.C. § 546(a) in filing his action. By an order and memorandum entered on July 21, 1986, the court concluded on the basis of *Rust* "that procedural rules such as Rule 6(a) and Bankruptcy Rule 9006(a) properly extend time periods prescribed by the rules or by any applicable statute once the action has commenced, but they cannot enlarge *ex post facto* the time for commencing the action itself." Memorandum opinion at 6-7 [Petition appendix ("Pet. app.") B at 69]. The district court ordered dismissal of the complaint, and an appeal to the Sixth Circuit followed.

The Sixth Circuit affirmed the dismissal of the Trustee's complaint, rejecting all of the arguments now set forth in the Trustee's petition. The court of appeals agreed with the district court that the Trustee's complaint had not been timely filed:

> Because Bankruptcy Rule 9006(a) does not extend or limit the jurisdiction of the bankruptcy courts, *see* 28 U.S.C. § 2075, it does not alter the conclusion that a complaint must be filed within two years from the date of the trustee's appointment. The two-year limitations period begins to run on the date of the trustee's appointment and expires twenty-four months later, irrespective of whether the last day falls on a Saturday, Sunday, or holiday. [footnote omitted] Like the Federal Rules of Civil Procedure, the Bankruptcy Rules

> govern procedural matters after a procedure has been timely commenced. Jurisdiction must arise from section 546(a) without reference to Bankruptcy Rule 9006(a).

829 F. 2d at 600-01; Pet. app. C at 92.

The Trustee now petitions this Court to review the decision below, suggesting that he has been a victim of a "trap for the unwary." Petition at 41.

Although the Trustee devotes almost the entirety of his statement of facts to insinuations that First National somehow obstructed discovery of the facts necessary to the commencement of his suit, the record below is devoid of any evidence or findings to support such a charge. The reason for this absence, as the court below confirmed (Pet. app. C at 94), is that the Trustee never raised this issue in the bankruptcy court or the district court. In fact, the Trustee did not even mention the issue in the pre-argument statement that his counsel mailed to the clerk of the court of appeals on August 12, 1986. Not until nearly two months later, when he served his supplemental pre-argument statement on October 8, 1986, did this new rationalization occur to the Trustee.

First National cooperated fully with the Trustee's investigation of the Butcher debacle, and nothing prevented the Trustee from filing his complaint on time except his misplaced reliance upon a procedural bankruptcy rule to extend a statute of limitations established by the Bankruptcy code. The Trustee's state-

facts is thus both inaccurate[1] and irrelevant. ... t has long followed the rule of not considering, even in a petition for writ of certiorari, matters not raised in the original proceedings below. *See, e.g., Ellis v. Dixon*, 349 U. S. 458, 460 (1955). The only issue presented to this Court is a legal one: whether the Sixth Circuit's refusal to extend the two-year limitations period prescribed by 11 U.S.C. 546(a) by means of a rule of bankruptcy procedure deserves the scrutiny of this nation's highest court.

REASONS FOR DENYING THE WRIT

Rule 17 of the Rules of the Supreme Court of the United States has codified the Court's earlier decisions establishing that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and

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[1]For example, First National never advised the Trustee "that the Trustee had not been afforded access to all the documentation in the possession of First National." Petition at 13. First National merely refused to accede to the Trustee's demand for "written confirmation" that First National possessed no pertinent documents other than those already "inspected" by the Trustee's counsel. The reason for this refusal was hardly sinister: First National had produced numerous file drawers of documents at the Trustee's request and knew for a fact that the Trustee's attorneys had not yet inspected all of them. As for the deposition of Leonard Hardin on August 15, 1985 (Petition at 14-15), the record would show that this forty-two page deposition contributes nothing to what already was known or available to the Trustee from documents produced and prior depositions of Mr. Hardin. Apart from Mr. Hardin's having been available for a deposition at any time during the two years prior to August 15, 1985, except for brief periods of absence from the office, the Trustee certainly could have compelled his attendance at any time if additional testimony had been as critical as the Trustee now pretends.

will be granted only when there are special and important reasons therefor." The Trustee submits that the Sixth Circuit's decision in this case merits review under Rule 17 because it conflicts with decisions by other federal circuits on the same issue and even with two applicable decisions by this Court. Both contentions are wrong.

I. The Decision Below Does Not Conflict With Any Applicable Decisions of This Court

A. The Holdings In *Rust* and The Decision Below

Although a response to a petition for writ of certiorari is not the place to explore every subtlety of the merits of the underlying controversy, a glance at the merits is necessary here in order to show that neither the decision below nor, by implication, the Sixth Circuit's earlier *Rust* decision is at odds with any decision of this Court.

In *Rust,* the Sixth Circuit held that Rule 6(a) of the Federal Rules of Civil Procedure (reproduced in Petition at 5) cannot be used to extend the one-year statute of limitations of the Truth in Lending Act, 15 U.S.C. § 1640(e). Citing Rule 82,[2] the court reasoned that a complaint not filed within the time period prescribed by a federal statute leaves the court without jurisdiction to entertain it. "The Federal Rules of Civil Procedure do not alter this fundamental premise. . . . Their design is, rather, to govern procedural mat-

[2]Rule 82 provides in part that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein."

ters once an action is properly before the court." 614 F. 2d at 1119.

Despite its reference to jurisdiction, the holding in *Rust* specifically concerned "the relationship between a federal statute and Rule 6(a)," *id.*, not the relationship between a federal statute and the court's jurisdiction in every other context. The court made this clear in *Jones* v. *TransOhio Savings Ass'n*, 747 F. 2d 1037 (6th Cir. 1984), in which it determined that the Truth in Lending Act's statute of limitations is subject to equitable tolling. The court restricted its references to jurisdiction in *Rust* as "addressing only the jurisdiction to hear claims under the TILA in the absence of fraudulent concealment meriting application of equitable tolling." *Id.* at 1042.

The simple message of *Rust* and *Jones*, therefore, is that the Federal Rules of Civil Procedure, which commence operation at the time of filing of a complaint, do not in themselves authorize the extension of a congressionally-prescribed limitations period, although a showing of entitlement to equitable tolling may make timely an otherwise tardy complaint. The corollary message of the decision below is that Bankruptcy Rule 9006(a) cannot save an untimely complaint in an adversary proceeding in bankruptcy, at least where no claim to equitable tolling has been raised in the pleadings or the bankruptcy court.

B. The Decision Below Does Not Conflict with *Zipes* v. *Trans World Airlines*

The Trustee contends (Petition at 38-40) that the decision below affronts this Court's holding in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982). The court there held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393. To put it another way, the court concluded that the limitations period established by 42 U.S.C. § 2000e-5(e) is not "jurisdictional." The Trustee thus tries to set up a conflict between this Court's reasoning in *Zipes* and the Sixth Circuit's references in *Rust* to the jurisdictional qualities of a statute of limitation. According to the Trustee's logic, such a conflict must surely taint both *Rust* and the adherence to it in the decision below.

As we have seen, however, the Sixth Circuit has never construed *Rust* as a metaphysical pronouncement on the mysteries of absolute jurisdiction. On the contrary, the Sixth Circuit cited *Zipes* in its *Jones* decision, 747 F. 2d at 1041, in deciding that the statute of limitations of the Truth In Lending Act, like that of Title VII, remains subject to the equitable doctrines of waiver, estoppel, and tolling. Since *Zipes* did not turn upon or even mention the relationship between Rule 6(a) and the statute, both *Rust* and the decision below are perfectly in accord with it.

C. The Decision Below Is Not In Conflict With This Court's Decision In *Union National Bank* v. *Lamb*

The Trustee places his greatest reliance upon a supposed discrepancy between the decision below and *Union National Bank* v. *Lamb,* 337 U. S. 38 (1949). *Lamb* involved the computation of time under 28 U.S.C. § 2101, which at that time established the ninety-day period for filing a petition for writ of certiorari with this Court. The petitioner in *Lamb* filed its petition on a Monday although the ninety-day period had expired on Sunday. Observing that Rule 6(a) provides the method for computation of time prescribed or allowed not only by the civil rules but by "any applicable statute," the court concluded "that the considerations of liberality and leniency which find expression in Rule 6(a)" were equally applicable to the statute governing the filing of a petition for writ of certiorari. 337 U. S. at 40-41.

In comparing the present case to *Lamb,* the Trustee seems to suggest that federal statutes of limitations like 11 U.S.C. § 546(a) similarly are "applicable statutes" governed by Rule 6(a) or its procedural models. The Trustee's argument, however, inserts into Rule 6(a) the word "every" for the word "applicable." The only plausible meaning of the phrase "any applicable statute" is discussed at length by Professor Moore in his treatise on federal practice:

> In determining what statutes are "applicable" and hence to be construed in the light of Rule 6(a), it is necessary to consider the scope of the rules

> themselves. Rule 1 provides that the "rules govern the *procedure* in the United States district courts." It follows, then, that Rule 6(a) does not provide a general rule of statutory construction which the courts are bound to apply to all time periods mentioned in any statute that may come before the courts, nor does the Rule apply to time periods mentioned in other documents, such as contracts. Rather, as the court stated in *Joint Council Dining Car Employees* v. *Delaware, L. & W. R. R.,* [157 F. 2d 417, 420 (2d Cir. 1946),] "Rule 6(a) is a rule of procedure relating to acts done or proceedings had after the commencement of action and to any statutes expressly applicable to such proceedings." The expression "applicable statute" will, therefore, certainly embrace the time provisions of any statute, state or federal, which is made applicable by the Federal Rules, since in that situation the period of time is in fact designated by the Federal Rules.

2 *Moore's Federal Practice* ¶ 6.06[1] at 6-70 (2d ed. 1987) (emphasis in original).

The statute construed in *Lamb,* therefore, was precisely the type of statute to which a rule of procedure should apply: a statute establishing a time for the taking of some action in a pending lawsuit that already has been timely filed. The certiorari statute contested in *Lamb* was both applicable to an action taken "after the commencement of action" and even analogous to a rule of procedure. In fact, the time period for filing a petition for certiorari is now established by Rule 20

of the Supreme Court Rules, while Rule 29 requires the method of computation performed in *Lamb*.

The statute that established the time period for filing a petition for writ of certiorari offers a good example[3] of an "applicable statute" both under *Lamb* and Professor Moore's analysis of the phrase: It regulated an act done or a proceeding had "after the commencement of action." Even in *Lamb,* however, this Court did not construe Rule 6(a) as *requiring* an extension of the statutory time period. It merely observed that the "considerations of liberality and leniency" finding expression in the rule were applicable. 337 U. S. at 41. Professor Moore thus cites *Lamb* in a footnote to his discussion of whether courts may elect to apply the policy of Rule 6(a) to an "inapplicable" statute:

> This does not mean that the *principles* of Rule 6(a) cannot be invoked by a court in construing a time period designated by a statute not expressly applicable to proceedings had after the commencement of the action. Courts may well decide, in the absence of a contrary and controlling rule of construction, that justice will be best

[3]Yet another example of an "applicable statute" is that governing the removal of an action from state to federal court, 28 U.S.C. § 1446. Several courts have concluded that the method of computation described by Rule 6(a) should be used in calculating the thirty-day period for removal prescribed by this statute. *See Boulet* v. *Millers Mutual Insurance Ass'n,* 36 F.R.D. 99 (D. Minn. 1964); *Meyers-Arnold* v. *Maryland Casualty Co.,* 248 F. Supp. 140, 143 n. 9 (D.S.C. 1965). Removal, of course, also occurs after the timely commencement of the action, thereby making the removal statute "applicable" under Rule 6(a).

> served by applying the principles of Rule 6(a) by analogy. [footnote omitted] It does mean, however, that the court is not *obliged* by the terms of the rule to apply it to such other statutes.

2 *Moore's Federal Practice, supra,* ¶ 6.06[1] at 6-71 (emphasis in original). In the very next section of his treatise, Professor Moore extends this reasoning to suggest that Rule 6(a) "could not be said to apply expressly to a statute of limitations, which is anterior to the time when the federal rules begin to apply." *Id.* ¶ 6.06[2] at 6-71. Nevertheless, Professor Moore again observes that courts may *choose* to apply the principles of Rule 6(a) by analogy.

Professor Moore's well-reasoned analysis of Rule 6(a) establishes not only an underlying accord between *Lamb, Rust,* and the decision below, but also the absence of any true conflict among the courts of appeals on this issue.

II. The Decision Below Does Not Conflict With the Decision of Another Federal Court of Appeals on the Same Matter

A. No Conflict Exists on the Applicability of Bankruptcy Rule 9006(a) to a Statute of Limitations Established By The Bankruptcy Code

The Trustee cites and discusses seven decisions[4] from other circuits in attempting to establish a conflict

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[4]Those decisions are *Kane* v. *Douglass, Elliman, Hollyday & Ives,* 635 F. 2d 141 (2d Cir. 1980) (Rule 6(a) used to compute ninety-day limitation period for filing employment discrimination

(Footnote Continued on Next Page)

between the decision below and a decision by another federal court of appeals. Interestingly, not one of these decisions involves the application of Bankruptcy Rule 9006(a) or even a bankruptcy statute generally. Narrowly construed, the issue presented to this court is the applicability of Bankruptcy Rule 9006(a) to the two-year limitations period prescribed by 11 U.S.C. § 546(a), not the universal applicability of Rule 6(a) to every other time period established by Congress. There is to date only *one* decision by a federal court of appeals on this issue: the decision below.

The distinction is hardly an idle one. First, the Trustee has constructed his argument in every court below on the premise that some inherent peculiarity of the bankruptcy statutes warranted the application of Rule 9006(a) despite the Sixth Circuit's construction of Rule 6(a) in *Rust*. This is, in fact, the argument that succeeded in the bankruptcy court. *See* Pet. app. A at 49-55. Holding the Trustee's feet to his own

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(Footnote Continued From Preceding Page)

claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1)); *Frey* v. *Woodard*, 748 F. 2d 173 (3d Cir. 1984) (Rule 6(a) used to compute time period under Federal Tort Claims Act, 28 U.S.C. § 2401(b)); *Hart* v. *United States*, 817 F. 2d 78 (9th Cir. 1987) (Federal Tort Claims Act); *Milam* v. *United States Postal Service*, 674 F. 2d 860 (11th Cir. 1982) (Title VII of Civil Rights Act of 1964); *Banks* v. *Chesapeake & Potomac Telephone Co.*, 802 F. 2d 1416 (D.C. Cir. 1986) (Rule 6(a) used to compute District of Columbia's three-year statute of limitations for personal injury actions); *First State Bank of Miami* v. *Gotham Provision Co.*, 669 F. 2d 1000 (5th Cir. 1982), *cert. denied*, 459 U. S. 858 (1982) (Rule 6(a) used to compute thirty-day notice prescribed by Packers and Stockyards Act, 7 U.S.C. § 196).

forge, he should not now be heard to complain that his bankruptcy problem necessitates a sweeping review of Rule 6(a) as applied to every conceivable federal statute.

Second, a case involving the applicability of Bankruptcy Rule 9006(a) to section 546(a) of the Bankruptcy Code is a poor vehicle for examining the scope of Rule 6(a). As the Trustee's own citations illustrate, most of the district and circuit court decisions in this area have arisen in cases involving limitations periods prescribed in statutes designed to remedy violations of personal rights, such as Title VII of the Civil Rights Act of 1964,[5] the Federal Tort Claims Act,[6] or the Truth In Lending Act.[7] Considered individually, these statutes may occasionally warrant application of the principles of Rule 6(a), both because of their special remedial purposes and because the act triggering the running of the limitations period—discovery of a personal injury, consumer fraud, or violation of a civil right—may be difficult to locate in time. Additionally, compliance with the statute invariably will require timely action by a lay person, both in recognizing the injury and in seeking counsel. Compare this to the situation in bankruptcy proceedings, where the triggering act—appointment of the trustee—is easily identifiable and the trustee ordinarily will be represented from the beginning by a battery of lawyers. These

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[5] 42 U.S.C. § 2000e *et seq.*

[6] 28 U.S.C. § 2671 *et seq.* (limitations prescribed at 28 U.S.C. § 2401).

[7] 15 U.S.C. § 1601 *et seq.*

distinctions between bankruptcy and other forms of litigation perhaps explain the absence of any other decision by a federal court of appeals concerning a "Monday filing" in bankruptcy court and the paucity of bankruptcy opinions on this point generally.[8]

This case, therefore, provides a poor springboard for an analysis of the broader implications of Rule 6(a). If a true conflict were to exist under the Truth In Lending Act, for example, between *Rust* and *Lawson* v. *Conyers Chrysler, Plymouth & Dodge Trucks, Inc.*, 600 F. 2d 465 (5th Cir. 1979), resolution of that conflict would better await presentation of a case involving that statute and similar equitable considerations. Since Rule 6(a) itself does not expressly apply to statutes of limitations, however, no true conflict would exist even if the issue in this case were to be cast broadly on the basis of Rule 6(a) instead of narrowly on that of Bankruptcy Rule 9006(a).

B. No Conflict Exists Among the Circuits on the Applicability of Rule 6(a) to Statutes of Limitations Because Application of the Rule Is Elective Under the Circumstances

The decisions by federal courts of appeals applying Rule 6(a) to a statute of limitations have never explained forthrightly and by reasoned analysis whether or why they were employing the rule expressly or by analogy. Typical is *Kane* v. *Douglass, Elliman, Holly-*

[8]The Trustee cites only two other cases on this issue, *In re Oro Import Co.*, 69 Bankr. Rep. 6 (S.D. Fla. 1986), and *In re Kaelin Associates Electrical Construction, Inc.*, 70 Bankr. Rep. 412 (Bankr. E.D. Pa. 1987). Thus, the history of Rule 9006(a) has occasioned only three reported efforts at any level to employ the rule for the extension of a statute of limitations in bankruptcy.

day & Ives, supra note 3, cited by the Trustee (Petition at 32) as a decision in conflict with the opinion below. *Kane* involved a *pro se* plaintiff who filed a complaint for sex discrimination under Title VII one day beyond the ninety-day limit established by 42 U.S.C. § 2000(e)-5(f)(1), a situation certainly involving equitable considerations absent from this case. The court seems to have applied Rule 6(a) as a matter of right to salvage the complaint, although it relied upon another Title VII decision[9] from another circuit extending the period because "the spirit of Rule 6(a) governed. . . ." 635 F. 2d at 142.

To address but one other circuit decision advanced by the Trustee as a "conflict," the court in *First State Bank of Miami* v. *Gotham Provision Co., Inc., supra* note 3, explained more clearly its decision to apply Rule 6(a). Like the panel below, which deferred to the spirit of *Rust* while considering a different statutory context, the panel of the Fifth Circuit in *Gotham* deferred to the Fifth Circuit's earlier decision in *Lawson, supra,* which applied Rule 6(a) to an otherwise tardy complaint under the Truth In Lending Act. *See* 669 F. 2d at 1014. In announcing its holding, however, the court explained that it perceived "no reason why the *method* of Rule 6(a) should not be invoked for purposes of computing the thirty-day notice and filing period prescribed by § 206 of the Packers and Stockyards Act." *Id.* (Emphasis added). At least in this instance, therefore, the Fifth Circuit seems to have

[9] *Pearson* v. *Furnco Construction Co.*, 563 F. 2d 815 (7th Cir. 1977).

adopted Professor Moore's suggestion that the application of the principle of Rule 6(a) "by analogy" is an option available to a court construing a specific statute of limitations.

The importance of Professor Moore's analysis to this case and to the Trustee's petition is that it invests federal courts with a degree of discretion in applying the "method" of Rule 6(a) under various statutes and various factual situations. It eliminates the need for a pronouncement by this Court establishing any requirement for the application of procedural rules "by analogy" in every conceivable situation, regardless of the statute or the equities involved. It also perhaps explains in part why this Court declined an invitation to review this same question in *Gotham, supra,* (petition for certiorari denied at 459 U. S. 858 (1982)), even though that case squarely presented the applicability of Rule 6(a) and any "conflict" that exists now existed then.

The Sixth Circuit's election not to apply procedural rules to extend a statute of limitations both in *Rust* and in the decision below is no more in conflict with decisions by other circuits than are other local rules supplementing federal rules of civil or appellate procedure. The propriety of drawing an analogy to Rule 6(a) in evaluating the timeliness of a complaint can and should be evaluated case by case, statute by statute. Thus, even if the issue were presented as "the applicability of Rule 6(a) to all federal statutes of limitations" rather than as "the applicability of Bankruptcy Rule 9006(a) to section 546(a) of the Bankruptcy Code,"

there still would exist no true conflict meriting the attention of this Court.

III. CONCLUSION

The Trustee argues in closing (Petition at 40-41) that Bankruptcy Rule 9006(a) sets a "trap for the unwary" if held inapplicable to statutes of limitations under the Bankruptcy Code. If so, it is a snare into which few have stumbled. The decision below is the first by any federal court of appeals addressing the relationship between Rule 9006(a) and a statute of limitations, a fact which alone suggests that Rule 9006(a) has hardly mined the landscape for bankruptcy litigants.

Unable to establish any true conflict between the decision below and a decision by another circuit or by this Court, the Trustee necessarily petitions this Court to salvage his bankruptcy complaint by undertaking a comprehensive review of the relationship between Rule 6(a) and all other federal statutes of limitations. In effect, he asks the Court to apply Rule 6(a) "by analogy" to innumerable federal statutes not even involved in this case. There is no need or even justification for such a broadside application, at least within the context of this particular lawsuit. Surely this Court's consideration of the scope of Rule 6(a) should await the emergence of a case implicating not only Rule 6(a) itself but also one of those federal remedial statutes, such as Title VII or the Truth In Lending Act, that have generated most of the litigation in this area.

Respondent First National Bank of Louisville respectfully asks that the Trustee's Petition for Writ of Certiorari be denied.

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